

DOCUMENT RESUME

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Acting Federal Insurance Administrator's Status and Authority.
B-183012. June 29, 1977. 6 pp.

Decision re: J. Robert Hunter, Acting Insurance Administrator,
Department of Housing and Urban Development: Federal Insurance
Administration; by Elmer B. Staats, Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation
(305).

Contact: Office of the General Counsel: General Government
Matters.

Budget Function: General Government: Central Personnel
Management (305).

Organization Concerned: Department of Housing and Urban
Development.

Authority: Vacancies Act (5 U.S.C. 3345-3349). 56 Comp. Gen. 137
; B-183012 (1976). 15 Stat. 168. 42 U.S.C. 3533a. 42 Comp.
Gen. 495. 55 Comp. Gen. 109. B-168424 (1977). U.S.
Constitution, art. II, sec. 2, cl. 2. 63 Am. Jur. 2d Public
Officers and Employees 504 (1972). 32 Op. Atty. Gen. 139.

The Acting Insurance Administrator's nomination for
Administrator was withdrawn February 23, 1977. Statutes mandate
position may be held only 30 days thereafter; after March 23,
1977, there was no legal authority for anyone to serve as Acting
Insurance Administrator. Subject appointed Deputy Administrator
may fill vacancy only 30 days until new Administrator is
confirmed. Validity of Insurance Administrator's decisions
during unauthorized tenure may necessitate court resolution.
Nevertheless, salary payments will not be recovered, as he was
de facto employee. (Author/DJM)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-183012

DATE: JUN 29 1977

MATTER OF: Acting Federal Insurance Administrator's status
and authority.

DIGEST:

1. When nomination of incumbent Acting Insurance Administrator for Administrator's position was withdrawn by President on February 21, 1977, and no further nominations made for Senate confirmation, the position may be filled by an Acting Administrator only for 30 days thereafter, pursuant to Vacancies Act, 5 U.S.C. §§ 3345-3349. After March 23, 1977, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator.

2. Although Acting Insurance Administrator was appointed Deputy Administrator on May 23, 1977, which job requires Deputy to act in place of Administrator during his absence or inability to act, this duty may not be performed until a new Administrator has been confirmed since maximum statutory period of 30 days to fill such vacancy under Vacancies Act has already been exhausted.

3. Validity of decisions made by Insurance Administrator during period he was not authorized to hold position is in doubt and may have to be resolved ultimately by courts. Secretary is advised to ratify those decisions with which she agrees to avoid confusion about their binding effect in future.

4. It is not necessary for this Office to recover salary payments made to Acting Administrator during period he was not entitled to hold that position since incumbent acted with full knowledge of Secretary and President and may be considered a de facto employee, entitled to reasonable value of his services which equates to same amount as his salary.

On December 9, 1976, we issued decision B-183012, 56 Comp. Gen. 137, to the Secretary, Housing and Urban Development (HUD), in which we concluded that the position of Federal

Insurance Administrator, established under 42 U.S.C. § 3533a (1970), requires Presidential nomination and Senate confirmation under Article II, § 2, Cl. 2 of the Constitution. We also stated that in the described circumstances, we did not think it appropriate for this Office to take exception to the past payments of compensation to the incumbent Insurance Administrator who was appointed to that position by the Secretary of HUD prior to the date of our decision in the belief that confirmation was unnecessary. However, since the Congress was not then in session, we did not object to the payment of compensation to the incumbent for a reasonable period of time following the date of the decision in order to afford an opportunity for the President to present him to the Senate for confirmation to the position of Federal Insurance Administrator. This is a follow-up decision, which examines the status of the incumbent Insurance Administrator from the time of our previous decision to date.

On January 11, 1977, former President Ford submitted the nomination of the incumbent, Mr. J. Robert Hunter to the Senate. President Carter withdrew Mr. Hunter's nomination on February 21, 1977. Mr. Hunter, however, continued to serve as Acting Insurance Administrator, with compensation at the Executive Level IV pay scale.

According to a report received from the Secretary, HUD, dated May 2, 1977, it was decided, after a departmental review of Mr. Hunter's status, and taking into consideration our decision as well as subsequent events, that there was no longer legal authority for Mr. Hunter to continue to serve as Acting Insurance Administrator. The report further stated that she had then "taken action" to remove Mr. Hunter from the position and that his name had been submitted to the Civil Service Commission for the position of Deputy Administrator.

We are informed that on May 4, 1977, the Civil Service Commission received a request for Mr. Hunter's certification to the position of Deputy Administrator, Federal Insurance Administration, General Schedule (GS) pay grade 17. We have been told by a Commission official that favorable action on the certification was completed on May 19, and communicated to HUD on May 23, 1977. During the interim between May 4 and May 23, Mr. Hunter continued to serve as Acting Administrator. In fact, we understand that Mr. Hunter has been serving as Acting Administrator at all times in question, signing decision letters, issuing regulations, and testifying before the Congress in that capacity.

Once Congress was in session and there was no Presidential nomination for it to consider, the position of Insurance Administrator could only be filled temporarily in accordance with the provisions of the so-called "Vacancies Act."

5 U.S.C. § 3346 (1970) provides as follows:

"When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops."

5 U.S.C. § 3348 provides that a vacancy caused by death or resignation may be filled temporarily under section 3346 for not more than 30 days. Section 3349 provides that a temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3346 may not be made otherwise than as provided by that section, except to fill a vacancy occurring during a recess of the Senate.

All the cited sections are derived from the Act of July 23, 1868, ch. 227, 15 Stat. 168. The legislative history of the Act makes it clear that the provisions now codified as sections 3345 through 3349 of title 5 were intended to preclude unreasonable delays in submitting nominations for offices subject to Senate confirmation. In a debate recorded in the Congressional Globe of February 14, 1868, when the original Act was being considered, a Member of the sponsoring Committee, Mr. Trumbull, complained that under present law--

"* * * he [the President] is authorized to supply those vacancies for six months without submitting the name of a person for that purpose to the Senate; and it was thought by the Committee to be an unreasonable length of time, and hence they have limited it by this bill to thirty days."

The period of time was changed by floor amendment to 10 days, but increased to 30 days by the Act of February 8, 1891, which is the time limit now found in section 3348, supra.

We note that the position of Insurance Administrator has been without a nominee for 4 months already. This appears to be precisely the

sort of "unreasonable" delay the statute was enacted to prevent. In the absence of any other statutory authority to fill the position on a temporary basis outside the Vacancies Act, we conclude that the 30-day limit is applicable, and began to run on February 22, 1977, the day after the President withdrew Mr. Hunter's nomination. Thus, from March 24, 1977, to date, there was no legal authority for anyone to perform the duties of the Insurance Administrator except the Secretary herself, in whom, by statute, all the Administrator's functions are vested.

In informal discussions with HUD, prior to its decision to create the position of Deputy Administrator, it was argued that the Secretary has broad authority to delegate any or all of her functions to subordinate employees, (42 U.S.C. 3535(d)) and therefore it was permissible for her to delegate all the functions relating to the insurance programs of HUD to Mr. Hunter in some capacity other than as Acting Administrator. We concede that a literal reading of the statute would permit the Secretary to refuse to give even a properly appointed Administrator any of the duties that would normally seem appropriate to his office. However, in this case, she has already delegated the duties to an Administrator, and made them part of his job description. Once the period in which he may legally perform those duties has expired, any redelegation to another position--particularly if the other position is occupied by the same man who can no longer serve as Administrator--would seem a patent circumvention of the Vacancies Act.

We next consider Mr. Hunter's status as Deputy Administrator, which began, as previously noted, on May 23, 1977. A similar position was certified by the Civil Service Commission on June 29, 1976, but was cancelled on January 10, 1977. The duties and responsibilities which are the same both for the previously established position and the current position, include the following:

"The Deputy Administrator for Federal Insurance Administration assists the Administrator in the performance of all of his duties and responsibilities and in general, is authorized to act for him both concurrently and in his absence. He participates with the Administrator in directing and coordinating the Department's activities with respect to the many major programs and responsibilities assigned to the Administrator."

As indicated by the position description, the Deputy Administrator may act for the Administrator in the Administrator's absence. The

foregoing appears to contemplate a situation in which there is a duly appointed Administrator who may be absent and unable to perform his duties for various reasons, including travel, sickness, etc. This is a duty commonly assigned to deputies or first assistants throughout the Government and is certainly not objectionable per se. However, since the time has long since expired when anyone--whatever his title--may serve as Acting Administrator, Mr. Hunter may not perform that part of his duties.

We are mindful of the practical difficulties of being forced to run a program with no one at the head to make decisions. Until the President submits a nomination to the Senate, however, such decisions can only be made legally by the Secretary.

We have received a number of inquiries from members of the insurance industry and others as to the legality and binding effect of regulations issued and other decisions made by Mr. Hunter as Acting Administrator during the period he was not authorized to hold that position.

In general, we have held that acts performed while a person is serving in a de facto status, are as valid and effectual insofar as they concern the public and the rights of third persons as though he were an officer de jure. 42 Comp. Gen. 485 (1963) and citations therein.

A de facto officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Where there is an office or position to be filled, and one acting under color of authority fills the office or position and performs its duties, his actions are those of a de facto officer or employee. See decision B-188424, March 22, 1977, and decisions cited therein. With regard to defective or invalid appointments, the general rule is stated in 63 Am. Jr. 2d Public Officers and Employees § 504 (1972) as follows:

"The general rule is that when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he will be an officer de facto, notwithstanding that there was want of power to appoint in the body or person who professed to do so * * *."

In the aforementioned case, however, the occupancy of the position was not itself precluded by statute; it was only the individual incumbent

B-183012

who had not been validly appointed to the position. Court cases on this question are also sparse, although we feel that ultimately the questions raised by the insurance industry spokesmen will have to be resolved in that forum. We tend to agree with the Attorney General who, in 1920, warned the Department of State, which had been without a Secretary of State for a number of days, that--

"* * * Subsequent to such temporary occupancy of said Office and prior to confirmation by the Senate of a successor nominated for the Office, it was safer for the officers of the Department of State not to take action in any case out of which legal rights might arise which would be subject to review by the courts."
32 Op. Atty. Gen. 139.

It is too late now to offer the same advice to HUD. We suggest that the Secretary consider ratification of those actions and decisions of Mr. Hunter with which she agrees, to avoid any further confusion as to their binding effect.

Finally, with respect to Mr. Hunter's personal situation, he was not, as previously discussed, legally occupying the position of Insurance Administrator or Acting Administrator from March 23, 1977, on, and was not, as we understand it, appointed to any other position in HUD until May 23, 1977, when he became Deputy Administrator. Therefore, he was not entitled to receive salary and related benefits from the Department. However, we cannot consider Mr. Hunter a usurper, devoid of any color of authority. At all times relevant he performed the duties of the office of Insurance Administrator with the knowledge and apparent acquiescence of the Secretary and the President. In our view, he meets the definition of a de facto officer or employee, discussed supra, and would be entitled to receive the reasonable value of his services, which we believe is compensation at the Executive Level IV pay scale. See 55 Comp. Gen. 109, supra. It is therefore not necessary for us to take action to recover the salary paid to Mr. Hunter in the past. Since May 23, 1977, he can only be compensated at the GS-17 level established for his new position as Deputy Administrator.

(SIGNED) ELMER B. STALIN

Comptroller General
of the United States